SUPREME COURT, U. S.
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No. 420

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JEROME S. GLAZER, LOUIS A. GLAZER, *Petitioners,*

v.

GUILFORD GLAZER, *Respondent.*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioners hereby reply as follows to respondent's opposition to their petition for a writ of certiorari:

1. Respondent asserts that the trial judge did not "strictly" adhere to the requirement of Rule 50(c)(1). (p. 5.) The fact is there was a complete lack of adherence to the clear and mandatory requirements of that rule.

2. Respondent contends that the trial judge's rejection of all petitioners' grounds for a new trial without giving reasons for such rejections constituted substantial compliance with the mandatory requirements of Rule 50(c)(1). However, every motion for a new

trial is accompanied by one or more supporting grounds. Acceptance of a contention in each instance that the mere rejection of such grounds is the equivalent of compliance with the requirements of the rule obviously would nullify the rule and would permit district courts to continue the practice followed prior to the adoption of the rule.

3. By the same token, respondent's contention that the Fifth Circuit was in effect able to guess the reasoning of the trial judge would, if accepted, also serve to nullify the mandatory requirements of Rule 50(c)(1). And surely it cannot be said with any justification that these petitioners must be penalized because of the fortuitous and unfortunate circumstance that the trial judge in this particular case has now retired.

4. Respondent's reference to 5 Moore's Federal Practice at page 6 of his opposition is misplaced. First, the error here is "substantial;" petitioners were, as pointed out in their petition, substantially prejudiced by the trial judge's failure to comply with the mandatory requirements of Rule 50(c)(1). Second, respondent's argument, if accepted, would substantially emasculate the requirements of Rule 52 as well as Rule 50(c)(1). The case cited by *Moore* for the statement quoted in respondent's reply involved only a single fact which had been merged in the judgment. The instant case is far more complex, and the necessity of adherence to the requirements of Rule 50(c)(1) was clearly shown in the petition. (pp. 5-10.)

5. Similarly, there is no merit to respondent's footnote contention that petitioners "could have filed a motion to require the trial court" to comply with the provisions of the rule. There was no reason to believe

that the trial judge would not file his reasons as he indicated he would do between the time of his judgment and the date that respondent filed his notice of appeal.* Thereafter, of course, the trial judge was without jurisdiction to proceed further in the cause.

6. In attempting to deal with point II of the petition, respondent has completely ignored the substantial question raised by virtue of the prejudice stemming from the trial judge's allowing the jury to determine the judicial question of whether the contract was ambiguous or unambiguous. Respondent brushes aside the trial judge's admitted error, and claims that the jury, by overhearing remarks made by the trial judge at the beginning of the trial, must have assumed three weeks later, despite the contrary instructions, that the trial judge believed the contract to be ambiguous. There is no rational basis for this contention. The point is that the trial judge's instruction authorized the jury to find that the contract was unambiguous (in direct conflict with the later finding of the Fifth Circuit). If the jury so found, then, under the clear instructions of the trial judge, it was precluded from considering evidence which would have resolved the ambiguity in the contract—much of which was favorable to petitioners.

7. Respondent's reply to point III of the petition—the trial judge's refusal to allow the jury to consider the answer to the charge of "conspiracy"—fails to meet the petitioners' contentions. Respondent falls back on the assertion that neither counsel mentioned the word "conspiracy" in their closing arguments. However, the trial judge repeatedly referred to the conspiracy charge in his instructions. Certainly, the

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* R. 1939-40; petition, pp. 1a-2a.

jury was more likely to be influenced by the instructions than by the argument of counsel. Indeed, the jury was bound to follow the instructions of the trial judge. The trial judge, after repeatedly telling the jury that petitioners had been charged with perpetrating a conspiracy, then told the jury in effect that the evidence of respondent's misconduct prior to the date of the contract was "not to be a guide for the determination of liability or the award of damages under the . . . contract." (R. 1740). This, we submit, was prejudicial in that it nullified the voluminous evidence adduced by petitioners which, if allowed to be considered by the jury, might well have resulted in a finding of no liability on the part of petitioners.

In view of the foregoing, as well as the contentions contained in the petition, petitioners respectfully urge that a writ of certiorari be issued to review the judgment herein of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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